United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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75-7170

To be argued by
JOSEPH ARTHUR COHEN

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

JOSEPH RODRIGUEZ,

Plaintiff

—against—

OLAF PEDERSEN'S REDERI A/S,
Defendant and Third Party Appellee,

—against—

AMERICAN STEVEDORES, INC.,
Third Party Defendant-Appellant,

—and—

A. M. KRISTOPHER CO., INC.,
Third Party Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF THIRD PARTY DEFENDANT-APPELLANT, AMERICAN STEVEDORES, INC.

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Preliminary Statement

Plaintiff (not a party to this appeal) brought this action to recover damages for personal injuries sustained by him on July 3, 1967 while working as a longshoreman aboard the m/v SUNNY PRINCE. Plaintiff sued the owner and operator of the aforesaid vessel, Olaf Pedersen's Rederi

A/S (the appellee herein and hereinafter referred to as Shipowner) alleging separate and distinct causes of action for negligence and unseaworthiness. The Shipowner impleaded plaintiff's employer, American Stevedores, Inc. (appellant herein and hereinafter referred to as Stevedore) and a ship cleaning company, A. M. Kristopher Co., Inc. (not a party to the appeal) seeking indemnity for alleged breach of the warranty of workmanlike service.

All fact issues in the case were tried to a jury.

In answering the special interrogatories given to it by the Court, the Jury found for the plaintiff against the Shipowner on both causes of action. The jury specifically found that the Shipowner was negligent and it also specifically found that the vessel was unseaworthy. The jury further found that the plaintiff had been contributorily negligent and by reason of the same reduced his recovery from $80,000 to $35,000.

The indemnity action against A. M. Kristopher was then discontinued and the trial continued before the same jury on the Shipowner's claim against the Stevedore. The jury returned its verdict in favor of the Stevedore on that indemnity claim.

The Shipowner thereafter made a post trial motion for a judgment of indemnity against the Stevedore notwithstanding the verdict upon the grounds that the plaintiff's contributory negligence entitled it to such judgment as a matter of law. Alternatively, it asked for a new trial.

Because he felt that the record contained evidence of indemnity precluding conduct on the part of the Shipowner, Judge Rosling denied the motion for judgment as a matter of Law (682a).* However, he did grant the Ship-

* Unless otherwise indicated, all references are to pages of the Joint Appendix.

owner a new trial on the indemnity issues so that it might have a further opportunity to put in additional proof on the issues raised.

It should be noted at this point that the Shipowner never appealed from the judgment obtained against it by the plaintiff herein, and it is thus concluded and bound by the jury finding of negligence on its part.

Following Judge Rosling's demise, the case was reassigned to Judge Neaher. Notwithstanding the fact that its motion for judgment against the stevedore had already been denied by Judge Rosling, Shipowner moved again for that relief before Judge Neaher (687a). And, even though Judge Rosling had granted the Shipowner a new trial so that it might have another opportunity to offer further evidence on the indemnity issue, Shipowner's attorney stated in his moving affidavit to Judge Neaher that he had no further proof to offer (693a). Since Shipowner admitted that it had no additional evidence to present upon a new trial, the Stevedore then brought on a cross motion to recall the order for a new trial and for the entry of judgment in favor of the Stevedore in accordance with the jury verdict upon the ground that the Shipowner rendered academic Judge Rosling's *desideratum* for a new trial and waived its right to the same. In other words, if the Shipowner has no further proof to offer on the indemnity issues, there is no purpose served by a new trial and the verdict already rendered on the evidence presented should be enforced by a judgment.

Judge Neaher granted the Shipowner's motion for judgment against the Stevedore and denied the Stevedore's cross motion (708a) and judgment was entered accordingly (725a).

Thus, although a full jury trial on the merits resulted in a verdict in its favor, the Stevedore has been denied the

fruits of that victory by inconsistent judicial intervention. The initial trial Judge (Rosling, D.J.) consistently denied Shipowner's argument that it was entitled to indemnity as a matter of law, but awarded it a new trial so that it might have a further opportunity to put in additional proof. The Shipowner rejected that opportunity to put in any further proof by stating that it had none, but it then obtained judugment against the Stevedore from Judge Neaher on the identical arguments that had earlier been rejected by Judge Rosling. It is from that result and judgment that this appeal is taken.

The Proof on Trial

The accident occurred in the #2 hatch of the m/v SUNNY PRINCE on July 3, 1967. The only work to be done by the Stevedore in that hatch on that day was to discharge frozen shrimp from a reefer box in the after part of the upper tween deck. Plaintiff was one of the men in the longshore gang doing that work. *All of the Stevedore's work in that hatch—that is to say, the entire discharge operation—was completed at approximately 11 o'clock in the morning at which time the longshoremen left the hatch.*

After finishing their work in the #2 hatch, the longshoremen went to the vessel's #4 hatch. At the #4 hatch, the longhoremen uncovered the hatch square and then removed 4 or 5 hatch boards before breaking for lunch. After lunch his same gang of longshoremen, including the plaintiff, returned to the #4 hatch to discharge some green hides from the #4 lower hold. Plaintiff realized that he had left his hook and gloves in the #2 hatch when he finished working in the #2 hatch earlier that day. He advised the "header" that he had left his hook and gloves in the other hatch and he received permission to get them.

It is important to note that when the longshoremen finished their work in the #2 hatch and left that hatch at approximately 11:00 A.M. the hatch square on the level of the upper tween deck was covered with hatch boards. Further, when the longshoremen left the #2 hatch after finishing their work there at approximately 11:00 A.M. the weather deck was open and afforded illumination of the upper tween deck immediately below.

Unbeknownst to the plaintiff or any other longshoreman or stevedore employee, the conditions in the #2 hatch had changed drastically from the time that the longshoremen had finished their work and left that hatch at 11:00 A.M. Ship cleaners working in the #2 hatch after the longshoremen had finished had removed the hatch boards that had covered the #2 upper tween deck area. The ship cleaners also covered the #2 hatch on the weather deck. The ship cleaners had been specifically directed by the vessel's chief officer not to replace the covers that they had removed from the vessel's upper tween deck, and were also told by the vessel's chief officer to cover up the weather deck at the #2 hatch. The result of those orders given by the vessel's chief officer to the ship cleaners was that the #2 upper tween deck area was now in darkness (whereas it had been light when the longshoremen left) and the hatch square in the #2 upper tween deck was open (whereas it had been closed when the longshoremen had earlier left).

As aforesaid, there was no proof whatever that the stevedore had advice or notice of the fact that what had been a covered and illuminated upper tween deck area in the #2 hatch was now open and in darkness.

The route taken by the plaintiff to get from the #4 lower hold where he was working to the #2 tween deck where he had left his hook and gloves was as follows. He climbed

from the lower hold of #4 hatch into the tween deck of that hatch so that he was standing on the same deck level as where he had left his gloves and hook in #2. On that tween deck level in #4, he noticed a door, slightly ajar, in the forward offshore section. He assumed, and properly so, that he could walk through this door and proceed forward to the #2 upper tween deck where he had left his gloves and hook. That door had no signs warning or cautioning or prohibiting its use. The route that plaintiff took was selected by him and no one was informed of the same beforehand.

After proceeding forward through the aforesaid door for approximately 20 feet, the passageway became dark. Plaintiff then used a penlight which he carried with him and proceeded through this passageway without incident and in fact arrived at the #2 upper tween deck. While searching in that deck area for his gloves and hook, he tripped over the hatch coaming and fell through the now open hatch square down to the lower hold.

(The accuracy of the above synopsis of the proof on trial is attested to by the moving affidavit of Shipowner's attorney [689a]).

The thrust of the plaintiff's negligence cause of action was that the vessel's chief officer was negligent in directing the ship cleaners to leave the square of the #2 upper tween deck open and in darkness without notification or advice to the longshoremen about the change in condition; and that it was also negligent for the Shipowner to have left the door in the #4 hatch ajar as an open invitation for people to enter into a darkened passageway that led into a now darkened #2 hatch. The claimed unseaworthiness consisted of the #2 upper tween deck hatch square being left open while the entire hatch was concurrently

dark because the main deck square had been closed; and in the aforesaid forward door of the #4 hatch being open and inviting.

The Shipowner denied those charges and contended that the accident occurred solely because of the negligence of the plaintiff in entering into the darkened upper tween deck with the inadequate illumination afforded by his penlight.

As indicated above, the jury found that the Shipowner was negligent as charged by the plaintiff, and also found that the ship was unseaworthy as charged by the plaintiff. It further found that the plaintiff was contributorily negligent as charged by the Shipowner. No appeals were taken from that verdict and the judgment entered thereon was paid by the Shipowner.

The Indemnity Issue

It is to be noted that in claiming indemnity from the Stevedore as a matter of law the Shipowner points solely to the finding of contributory negligence. In other words, aside from plaintiff's contributory negligence in retrieving his personal property from a hatch in which the Stevedore had already completed its work hours before, the Shipowner points to no impropriety by the Stevedore in connection with the latter's work performance.

Prior to summations on the indemnity phase of the case, Judge Rosling advised counsel that he would charge the jury that the plaintiff's contributory negligence would be imputable to the Stevedore so that the primary issue for resolution was whether or not the Shipowner's own conduct precluded indemnity. As charged by Judge Rosling:

"You have found, in summation, that he (plaintiff) was a negligent person in so conducting himself, and therefore I instruct you that negligence must be found by you in this part of it as also to be the negligence of the stevedore.

* * *

"The rule is that if in undertaking to render its stevedoring operations in a reasonably workmanlike manner, the stevedore renders a substandard performance which leads to foreseeable liability of the ship, the ship—that is the shipowner—is entitled to indemnity if the shipowner itself does not engage in conduct on its part sufficient to preclude recovery."

Summation arguments by counsel for the Stevedore and the Shipowner stressed heavily the issue of "conduct precluding indemnity." With the issue so pointed by virtue of the summations and the charge, it is evident that the same jury that found the Shipowner to be negligent herein also found that such negligence constituted "conduct precluding indemnity."

Under applicable and established law the Stevedore was entitled to the entry of judgment in its favor dismissing the Shipowner's indemnity claim in accordance with the jury verdict. It is respectfully submitted that it was error for Judge Rosling to initially grant a new trial and that it was further error for Judge Neaher to thereafter enter judgment in favor of the Shipowner and against the Stevedore in direct contravention of the jury verdict.

POINT I

The Stevedore Is Entitled to Judgment in Its Favor in Accordance With the Jury Verdict Herein.

As matters now stand, a shipowner found negligent in causing a darkened hatch to have an open and unguarded square about which it gave no warning and to which it invited access has been held entitled, notwithstanding a jury verdict to the contrary, to be fully indemnified from the consequences of its own negligence by a stevedore who had long since finished its work in that hatch and had no control over the same and was without knowledge of the dangerous condition. That result has been reached merely because the stevedore's employee was found contributorily negligent in going into that darkened hatch to obtain some personal possessions that had been left there. Although the Shipowner has already benefited from the longshoreman's contributory negligence in that the judgment entered against it was for an amount reduced by the extent of that contributory negligence, it has now been awarded (contrary to a jury verdict) reimbursement for not only the remainder amount that it has had to pay to the plaintiff-longshoreman for its own negligence, but also for its legal expenses in defending against an accident caused by its own negligence. Such an anomalous result is not only contrary to established maritime law, but the manner in which it was reached has violated the Stevedore's guaranteed constitutional right to a trial by jury.

A. *The Mere Fact That Plaintiff Was Contributorily Negligent Does Not Require the Granting of Indemnity as a Matter of Law.*

As aforesaid, the Shipowner has sought indemnity from the Stevedore on the basis that the latter breached its

implied warranty of workmanlike performance (WWP). However, the only basis for urging a breach of WWP is the contributory negligence of the plaintiff. There was simply no proof whatever of any other fault, negligence or impropriety on the part of the Stevedore or any of its other employees. But, as recent decisions make clear, the mere fact that plaintiff was contributorily negligent does not require the imposition of an indemnity liability upon his employer as a matter of law. This proposition was considered only recently by this Court in *Nye* v. *A/S D/S Svendborg,* 501 F. 2d 376, *cert. den.* —— U.S. ——. Although *Nye* was found to be 50% contributorily negligent for failing to request additional boarding apparatus from the Shipowner (the plaintiff in the case at bar failed to request lighting), this Court reversed the finding of the District Court that *Nye's* employer breached its WWP and dismissed the Shipowner's third party action for indemnity.

Analysis of the factors giving rise to that result in *Nye,* indicates that they are similarly present in the instant case. Of paramount importance in *Nye* was the fact that the employer had no control over the operation taking place at the time of the accident. So, too, in the instant case. Here the employer had finished its work in the #2 hatch and had physically left the same several hours before the accident. It had no further work to do in that hatch and the conditions of that hatch were changed upon express orders given by the vessel's chief officer to the ship cleaners *after* the Stevedore had left the #2 hatch. It was completely within the power of the Shipowner to put the #2 hatch in such condition as it wished, and certainly the Stevedore which had finished its work in that hatch and had nothing further to do there was completely without control over what the Shipowner did.

Another important factor taken into account in *Nye*, was that the employer had no knowledge of the conditions existing at the time of the accident. So, too, in the instant case. The Stevedore did not know that after it had left the #2 hatch the vessel's chief officer had the #2 tween deck hatch square opened and the main deck square closed so as to leave the open and unguarded square in total darkness. The chief officer never advised the Stevedore of such change in conditions, and the Stevedore had no reason to make independent inquiry as it had long since completed its work in that hatch, and, the knowledge acquired by plaintiff was not adequate notice to the Stevedore, *Calderola* v. *Cunard S.S. Co.*, 279 F. 2d 475.

Again, in *Nye*, the employer did not know the means by which *Nye* would attempt to board the vessel. In the instant case the Stevedore did not know the means by which Rodriguez would search for his personal belongings in the #2 hatch.

In *Nye*, the contributory negligence of the plaintiff was personal to him in the sense that it related to his failure to request additional boarding apparatus. In the instant case, the contributory negligence of Rodriguez is similarly personal to him in the sense that he failed to request lighting from the Shipowner and sought to utilize the illumination given off by his own penlight.

In *Nye*, his employer had no notice of anything to indicate that Nye should not have been sent out on that particular job. So, too, in the instant case was the Stevedore not shown to have had any notice regarding Rodriguez which should have prompted it not to hire him for this job.

By reason of the foregoing it was held in *Nye* that of all the participants involved in the accident the employer

"would appear to be the least culpable." It is respectfully submitted that in the instant case the employer is also the least culpable and should not be made to pay for the Shipowner's negligence. The mere fact of an employee's contributory negligence does obviously not dictate such a result as a matter of law.

On February 17, 1975, the New York Court of Appeals in *Anzalone* v. *Moore McCormack Lines, Inc.*, affirmed without opinion a decision of the Appellate Division, First Department, 43 A.D. 2d 818, 351 N.Y.S. 2d 6, which in turn affirmed a judgment dismissing a shipowner's indemnity action against a marine carpentry company notwithstanding that the plaintiff employee had been found to have been contributorily negligent. As here, there was a jury verdict in favor of the employer and the ultimate holding was that the mere fact of plaintiff's contributory negligence did not require indemnity as a matter of law.

In *Julian* v. *Mitsui O.S.K. Lines Inc.*, 479 F. 2d 432 (5 Cir. 1973), *cert. den.* 414 U.S. 1093, even a finding of 95% contributory negligence on the part of the plaintiff longshoreman did not preclude dismissal of the indemnity action.

In *Lanzetti* v. *Grace Line Inc.*, 478 F. 2d 1398 the United States Court of Appeals for the Third Circuit affirmed without opinion an unpublished decision of the District Court denying and dismissing the shipowner's claim for indemnity against the stevedore employer notwithstanding the contributory negligence of the plaintiff longshoreman employee.

As a synthesis of these recent cases indicates, it is the quality of the imputed contributory negligence that controls the indemnity issue. Such determination is for the trier of the facts. At the very least, it is clear that the mere finding

of contributory negligence on the part of an employee does not require the granting of indemnity against the employer for breach of WWP as a matter of law.

B. *Even Where There Has Been a Breach of WWP, the Shipowner's Own Conduct May Preclude Indemnity.*

Even where a breach of WWP has been established, a Shipowner may nonetheless not be entitled to recover indemnity if its own conduct was such as would preclude recovery. Whether the shipowner has so precluded itself is an issue of fact. As stated in *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co.*, 355 U.S. 563 (1958):

> "If in that regard respondent (stevedore) rendered a substandard performance which led to the foreseeable liability of petitioner (shipowner), the latter was entitled to indemnity *absent conduct on its part sufficient to preclude recovery. The evidence bearing on these issues * * * was for jury consideration under appropriate instructions.*" (italics added)

It is important to note that in the above cited *Weyerhaeuser* case, the unsafe winch shelter which caused the accident had been built by the impleaded stevedore and used by the impleaded stevedore notwithstanding that it was obviously unsafe. If in that factual context, the Supreme Court held that the issues of maritime indemnity were for jury consideration, it follows, *a fortiori* that those issues were properly for jury consideration in the instant case. The existence of those *fact issues* in a case of maritime indemnity was again recently acknowledged by this Court in *Hurdich* v. *Eastmount Shipping Corp.*, 503 F. 2d 397.

In the instant case, Judge Neaher acknowledged the truth of the proposition that "the issue of whether the

Shipowner has precluded itself is an issue of fact", but indicated that there was not sufficient evidence of conduct precluding indemnity in the instant case to warrant submission to a jury (715a). It is to be noted that in this regard Judge Neaher acted contrary to the Trial Judge who had consistently during and after the trial denied such arguments made by the Shipowner.

In view of the jury determination of Shipowner negligence (from which no appeal was taken) and the proof in the record amply supporting such determination, it was clear cut error for Judge Neaher to state that there was no evidence from which a jury could find indemnity precluding conduct.

C. *There Was More Than Ample Proof from Which a Jury Could, and Did, Find That the Shipowner's Conduct Precluded Indemnity.*

The happening of the accident in the instant case was almost identical to the accident involved in *Badalamenti* v. *United States*, 160 F. 2d 422 (2 Cir., 1947). There, as here, in searching for some gear, longshoremen working in one hatch entered into another hatch and were unable to observe that the square of that hatch was open because the hatch was in darkness. The plaintiff there fell through the open hatch in the darkness just as Rodriguez did here. In affirming the negligence of the shipowner for leaving such hatch open in darkness, Judge A. Hand wrote as follows for an unanimous Court: (p. 425 of 160 F. 2d)

> "After he had proceeded 15 or 20 feet, and beyond a point where the light coming from open hatch No. 2 had penetrated, he was of course aware that he was in an area of darkness; nevertheless, *he had no reason to suppose that hatch No. 1 was open and that he ran any risk, other than the general one of stumbling*

against something in the dark, for hatch No. 1 was closed on the deck above. We cannot say that he was likely to encounter any danger in attempting slowly to traverse this passage if, as he supposed, the hatch was not open. *Had it not been open he would not have plunged into the open hatch and met the fate which caused his injuries. Under the circumstances the trial judge was right in holding that Badalamenti's fall and injuries arose solely from the negligence of the respondent in not warning the stevedores that there was an open hatch within about 50 feet of where they were to work. We think it was foreseeable that they might have occasion to go to parts of the deck that were not lighted in pursuit of their calling. If they did, the open hatch was a great danger for it was not protected by any guardrail or ropes, or by any coaming sufficient to prevent an accident.* It is not reasonable to suppose that stevedores would not be likely to go about the deck where they were working and not to foresee danger to them from an open hatch which was only about 50 feet away. As a distinguished court said in Pioneer S.S. Co. v. McCann, 6 Cir., 170 F. 873, 868: *'It is hardly to be expected that men entering or working within a ship's hold will always keep within the exact parts of the hold where their employment, strictly construed, would call them.'*

The opinion of Judge Woods in The Omsk, 4 Cir., 266 F. 200, supports the view that some warning or protection against an open hatch was required in circumstances like those here, where the open hatch was in the control of the shipowner. See also West India & P.S.S. Co. v. Weibel, 5 Cir., 113 F. 169." (italics added)

Although this Court held in *Badalamenti, supra,* that neither of the two plaintiffs there were guilty of contri-

butory negligence in walking about the darkened hatch since the only risk they ran was of stumbling against something in the dark and not falling through an open hatch, the Shipowner in the instant case has already profited in the reduction of the judgment against him for the contributory negligence of Rodriguez who in no respect acted differently than either of the plaintiffs in *Badalamenti*.

How can it be said that in creating this foreseeably dangerous situation and without giving any warning or notice of the same to either the longshoremen or the stevedores and, indeed, in leaving open and ajar a passageway door so as to implicitly invite its use as access to the #2 hatch, this Shipowner's conduct did not constitute a prima facie case for preclusion of indemnity? Let us compare other recent instances in which this Court has held that the shipowner's conduct was such as would preclude indemnity, and let us see if in the instant case the Shipowner's conduct is not at least equally egregious.

In *Conceicao* v. *New Jersey Export Marine Carpenters Inc.*, 508 F. 2d 437 the plaintiff-longshoreman was injured by rolling pipe when wooden pipe cribs broke because they were stowed with too many pipes by the stevedore-employer. It was held, among other things, that an experienced and competent stevedore would not have overloaded the pipe crib and have caused the same to break and the pipes to become dislodged. Accordingly, it was held that the Stevedore had breached its WWP, but indemnity was nonetheless denied because of the shipowner's conduct.

The conduct on the part of the shipowner held sufficient to preclude indemnity consisted essentially of the shipowner's failure to give the stevedore proper information regarding the overall amount of pipes to be stowed and the location of available pipe beds. This Court specifically held

that by such "inaction" the shipowner could foreclose its right of indemnity just as much as it could by an act of commission. That failure of the shipowner to give such advice or information to the stevedore was held to be sufficient from which a jury could conclude that the shipowner had "prevented, hindered or seriously handicapped" the stevedore in performing in a workmanlike fashion.

The record in the instant case also shows a failure on the part of the Shipowner to advise and inform the Stevedore of the changed conditions in the #2 hatch. And, it is to be remembered that it was this Shipowner's obligation to warn the Stevedore of the hidden danger in the #2 hatch of which it had actual knowledge, *Huger* v. *Dampsk.*, 170 F. Supp. 601, 610-611, *aff'd. sub nom. Metropolitan Stevedore Co.* v. *Dampsk.*, 274 F. 2d 875, *cert. den.* 363 U.S. 803.

But in addition to so failing to so advise the Stevedore, the Shipowner in this case is also responsible for the very creation of the dangerous condition. That condition came about only by reason of the express orders given to the ship cleaners by the vessel's chief officer who did not want to have the tween deck hatch covers replaced for reasons of economy. And, as sort of a tacit invitation, the Shipowner left the passageway door ajar so that persons on the tween deck of the #4 hatch would utilize that passageway in attempting to get to the #2 upper tween deck. The evidence of indemnity precluding conduct in this case is far greater than was the evidence in *Conceicao* which this Court has already held to be judicially sufficient.

In *Hurdich* v. *Eastmount Shipping Corp.*, 503 F. 2d 397, this Court again considered indemnity precluding conduct. In that case the contractor had created the dangerous condition causing plaintiff-seaman's injuries and was found to

have breached its WWP. However, indemnity was denied the shipowner because it had actual knowledge of the conditions and failed to rectify the same. Not only did the shipowner have actual knowledge of the conditions, but it had the ability to remedy the same as it had control over the area. In the case at bar, the Shipowner also had actual knowledge of the dangerous condition; and it too was the party with control over the area and the ability to eliminate the risk. But, in addition thereto, the Shipowner in the instant case is also responsible for creating the condition and for leaving the passageway door in the #4 hatch open and ajar as an invitation for the unwary.

The jury finding of Shipowner negligence and the proof regarding the same in the record renders completely inapposite the cases relied upon by Judge Neaher in granting the Shipowner's motion for judgment. For, neither *Mortensen* v. *A/S Glittre*, 348 F. 2d 383 nor its progeny *McLaughlin* v. *Trelleborgs*, 408 F. 2d 1334 and *Hartnett* v. *Reiss Steamship Company*, 421 F.2d 1011, have any application to a situation involving shipowner negligence. In *Mortensen* there was neither a finding of negligence on the part of the shipowner nor any proof whatever of culpable conduct on the part of the shipowner that might preclude indemnity. And, although *McLaughlin* and *Hartnett* held that a plaintiff-longshoreman's contributory negligence could constitute a breach of the stevedore-employer's WWP, they did not address themselves at all to the question of indemnity precluding conduct on the part of the shipowner.

It is to be further remembered that the last of the holdings of *Ryan Stevedoring Co. Inc.* v. *Pan-Atlantic Steamship Corporation*, 315 U.S. 124, 135 was that the shipowner's failure to discover and correct the stevedore's breach of WWP does not excuse such breach by the stevedore. In

the instant case, however, we are not at all dealing with the Shipowner's failure to discover a stevedore's breach. We are dealing with the Shipowner's creation of a dangerous condition of which it gave no warning or notice and to which it gave tacit invitation. Those actions by the Shipowner do foreclose it from indemnity and the jury verdict to such effect should have been embodied in a judgment herein. Indeed, the distinction between a shipowner who merely fails to discover a dangerous condition and a shipowner with actual knowledge of a dangerous condition was made clear by this Court in *Hurdich, supra.*

We further note that in recent decisions of this Circuit such as *Nye, Hurdich* and *Conceicao* consideration is given to the party best able to minimize the particular risk involved. That test, initially articulated in *DeGioia* v. *United States Lines Company*, 304 F. 2d 421 and thereafter applied in *Italia Societe* v. *Oregon Stevedoring Co., Inc.*, 376 U.S. 315, imposes the ultimate loss on the party "most able to minimize the particular risk involved." In the context of this case, that party was certainly the Shipowner, and not the Stevedore.

As aforesaid, the Stevedore had finished its work in and left hatch #2 several hours before the accident. It did not know about the dangerous condition created in that hatch by the Shipowner after it left and it was completely out of control of the conditions in the #2 hatch. As between the Shipowner and the Stevedore, it is only the Shipowner who could have, and in the future can, avoided this kind of accident by either closing up the open square, illuminating the tween deck or warning the Stevedore and the longshoremen of changed conditions. If this type of Shipowner conduct were to be repeated on any other ship, there is no realistic way for a stevedore to prevent one of its em-

ployees from being injured as Rodriguez was here and as Badalamenti was in his case. Only by the shipowners not creating this kind of dangerous condition or by warning of the same if it is created can this particular type of risk be minimized. The jury verdict in favor of the Stevedore is completely consistent with that test, and it is that verdict which should have been embodied in a judgment.

In the context of this case, the actions of the Shipowner above described were clearly a "hindrance" to what the plaintiff was seeking to do. The action of the Shipowner in causing a closed hatch square to be open and unguarded without notice or warning prevented and hindered the plaintiff herein from accomplishing his legitimate purposes in the #2 hatch in safety and without risk of falling through such unknown, open and unguarded hatch. He was certainly hindered in his ability to retrieve his glove and hook without falling into the lower hold.

Thus, it is respectfully submitted that by all applicable tests, the record herein contains such proof of indemnity precluding conduct on the part of the Shipowner as to warrant judgment in favor of the Stevedore in accordance with the jury verdict.

D. *The Actions of the Court Below Denied the Stevedore Its Constitutional Right to Trial by Jury.*

There can be no doubt but that the issues involved in a claim for maritime indemnity are factual issues "for jury consideration under appropriate instructions," *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co.*, 355 U.S. 563, 567. In *International Terminal Operating Co., Inc.* v. *N. V. Nederl.*, 393 U.S. 74, 75, the Supreme Court summarily reversed this Court and reinstated a jury verdict in favor of the stevedore against the shipowner and stated with regard to claims for maritime indemnity:

"Under the Seventh Amendment that issue should have been left to the jury's determination."

This Court has only recently reacknowledged that the issue of indemnity precluding conduct is an issue of fact, see *Hurdich* v. *Eastmount Shipping Corp.*, *supra*, Footnote 3. Indeed, even Judge Neaher has acknowledged this to be an issue of fact (715a).

However, the constitutional right to trial by jury requires more than lip service. It is the obligation of the Court in enforcing the constitutional right to trial by jury to view the facts in a light that will support the verdict. *Byrd* v. *Blue Ridge R.E.C.*, 356 U.S. 525, 538-539.

In a comparable maritime situation, the Supreme Court held that the right to trial by jury required the facts to be viewed in the light most favorable to the stevedore, since the jury verdict was in favor of the stevedore, *Atlantic & Gulf Stevedores Inc.* v. *Ellerman Lines*, 369 U.S. 355, 364. As the cited case indicates, the factual questions presented by a shipowner's indemnity action against a stevedore may not be *redetermined* by either the Circuit Court or the Supreme Court, just as the District Court may not *predetermine* those fact issues.

It seems clear that Judge Neaher did not attempt to view the case in a fashion that would support the verdict, as was his obligation under decided law. Rather, he substituted his own conclusions on the fact issues for those of the jury. But this may not be done. For, as was stated in *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U.S. 29, 35:

"Courts are not free to re-weigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because Judges feel that other results are more reasonable."

Nor can the results from the same evidence be inconsistent, *Caputo* v. *United States Lines Company*, 311 F. 2d 413, 416. The jury verdict finding the Shipowner negligent was entirely consistent with its subsequent verdict in denying the Shipowner recovery because of its own conduct. The determination by Judge Neaher that there is no evidence in this case for submission to a jury of indemnity precluding conduct creates a result completely inconsistent with that jury's unappealed verdict that the Shipowner was negligent. Such a result cannot be allowed to stand.

Another example of judicial substitution of its feelings for the verdict of a jury is to be found in this case in the action of Judge Rosling in granting the Shipowner a new trial. Judge Rosling granted a new trial without in any way finding that any error had been committed in the first trial. He did not acknowledge any error in the charge nor did he acknowledge that any error in the reception of evidence warranted a new trial. Indeed, the application for a new trial was merely a catch-all for the aforementioned motion for judgment n.o.v. and did not present any assignments of error for a new trial.

The fact that Judge Rosling wanted to give the Shipowner a second opportunity to show that the Stevedore had notice of the conditions to which the open door led (685a) is no legal reason for a new trial. The Shipowner had its day in Court, and has since been candid enough to state that it has no additional evidence in any event (693a).

CONCLUSION

The Stevedore herein is entitled to judgment dismissing the Shipowner's indemnity claim in accordance with the jury verdict, to which end this brief is

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MARGARET V. CONWAY, being duly sworn, deposes and says:

That he is over eighteen years of age and is not a party to the within action. That on the **21** day of **May**, 19**75**, she served ~~a true copy~~ two copies of the annexed

BRIEF OF THIRD PARTY DEFENDANT-APPELLANT

on

HAIGHT, GARDNER, POOR & HAVENS
One State Street Plaza
New York, N.Y.
Attorneys for Defendant-Appellee

herein, by depositing a true copy of the aforesaid properly enclosed in a securely sealed and postpaid wrapper in a Post Office box under the exclusive care and custody of the Government of the United States, at 801 Second Avenue, in the Borough of Manhattan, City and State of New York, addressed to the aforesaid as above stated, and that said address(es) was (were) the address(es) designated by the said attorney(s) as the address(es) within the State of New York, where papers in this action might be served.

Margaret V. Conway

Sworn to before me this
21 day of **May**, 19**75**.

Notary Public

JOSEPH ARTHUR COHEN
NOTARY PUBLIC, State of New York
No. 60-5741575
Qualified in Westchester County
Commission Expires March 30, 1976